

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

U.S. ELECTRONICS, INC.
105 Madison Avenue
New York, NY 10016

Plaintiff,

v.

FEDERAL COMMUNICATIONS COMMISSION
445 12th Street, S.W.,
Washington, DC 20554

Defendant.

Case No.: _____

**COMPLAINT FOR INJUNCTIVE RELIEF FOR VIOLATION
OF THE FREEDOM OF INFORMATION ACT**

Plaintiff U.S. Electronics, Inc., for its Complaint against the defendant, the Federal Communications Commission, states as follows:

JURISDICTION AND VENUE

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, *et seq.*, as amended, to require the disclosure of agency records requested and for other such relief as the court deems appropriate.

2. This Court has both subject matter and personal jurisdiction over this action pursuant to 5 U.S.C. §§ 552(a)(4)(B) and (a)(6)(E)(iii).

3. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B).

PARTIES

4. Plaintiff U.S. Electronics, Inc. ("USE") has its principal place of business at 105

Madison Avenue, New York, NY 10016.

5. Defendant Federal Communications Commission ("FCC" or "Commission") is an agency of the United States within the meaning of 5 U.S.C. § 552(f)(1) headquartered in the District of Columbia.

6. The Commission has possession of and/or control over the records requested by the USE in its FOIA Request and is a proper party under the FOIA, 5 U.S.C. §§ 552(a)(4)(B) and 552(f)(1).

STATEMENT OF FACTS

7. XM Satellite Radio Holdings Inc. ("XM") and Sirius Satellite Radio Inc. ("Sirius") are the nation's only Satellite Digital Audio Radio Service (SDARS) licensees.

8. FCC granted XM and Sirius their respective SDARS licenses in 1997.

9. Each license expressly prohibited one licensee from acquiring or combining the satellite radio spectrum of the other.

10. Each license was expressly conditioned on "their systems includ[ing] a receiver that will permit end users to access all licensed SDARS systems that are operational or under construction." (The "interoperability mandate").

11. On February 16, 2000, XM and Sirius entered into a Joint Development Agreement to develop the receiver allowing end users to access all licensed SDARS systems that are operational or under construction.

12. As part of the Joint Development Agreement, XM and Sirius exchanged their respective proprietary information with each other.

13. On October 6, 2000, Sirius and XM filed a letter with the FCC announcing their agreement to develop a unified standard for satellite radios and stated that inoperable chips

capable of allowing end users to receive both XM's and Sirius' services would be produced in volume by mid-2004.

14. According to Sirius' SEC S-4 filing at pp. 20-21 with the Securities and Exchange Commission (SEC) in late 2002 and early 2003, representatives of Sirius contacted representatives of XM, and despite the FCC's restriction imposed on their licenses, engaged in discussions about the possibility of a business combination between the two licensees.

15. These initial discussions ended without any agreement to further pursue the possibility of combining Sirius' and XM's operations.

16. On January 28, 2005, the Chief of the FCC's Satellite Division of its International Bureau, Thomas S. Tcyz, wrote and asked the licensees to update the status of their efforts to develop an interoperable radio receiver.

17. Responses to Mr. Tcyz's letter were due March 14, 2005, yet as stated below EB implausibly claims there are no responsive documents. See ¶ 62 *infra*.

18. In early 2006, Sirius contacted XM once again, and renewed its proposal to discuss "a variety of topics of interest to the two companies" including a merger with XM.

19. XM then informed its board of directors of the possibility of merger discussions with Sirius.

20. Over the next several months, XM and Sirius engaged experts to conduct the necessary due diligence required in the exploration of a business combination with XM and Sirius. *Id.*

21. On February 19, 2007, XM and Sirius entered into an Agreement and Plan of Merger ("Merger Agreement").

22. Pursuant to this Merger Agreement, on March 20, 2007, Sirius and XM submitted applications to the FCC seeking consent to transfer control of Commission licenses and authorizations held by Sirius, XM, and their subsidiaries pursuant to Section 310(d) of the Communications Act of 1934, as amended, and waiver of the restriction on combining their licenses or alternatively a declaration that due to changed circumstances the restriction was no longer operative.

23. XM's and Sirius' applications were docketed by the FCC in *Applications of XM Satellite Radio Holdings, Inc., Transferor, and Sirius Satellite Radio Inc., Transferee, Consolidated Applications for Authority to Transfer Control of XM Radio and Sirius Satellite Radio Inc.*, MB Docket No. 07-57 (March 20, 2007). (Hereinafter, "MB 07-57" or "Merger Docket").

24. Section 310(d) of the Communications Act requires the Commission to determine whether the public interest will be served or harmed by a grant of merger applications by Commission licensees.

25. Section 310(d) of the Communications Act requires the Commission to determine whether the public interest will be served or harmed by a grant of XM's and Sirius' merger applications in MB 07-57.

26. This Complaint arises out of USE's FOIA requests for the disclosure of records and information about the Applicants' history of compliance with Commission mandates that are directly relevant to the FCC's determination whether the public interest will be served or harmed by a grant of XM's and Sirius' merger applications in MB 07-57.

27. USE's FOIA requests cover a number of incidents involving the Applicants' history of compliance with Commission rules and orders.

28. USE's FOIA requests cover (1) the Applicants' history of compliance, *vel non*, with the Commission's mandate that Sirius and XM develop an interoperable radio that can

receive the signals of both SDARS licensees, (2) the Applicants' dealings with the Commission in connection with inquiries from the Commission about whether Sirius' radios that contained FM transmitters complied with applicable emissions limits, and (3) the Applicants' construction of terrestrial repeaters at unauthorized locations.

29. USE's FOIA requests, if processed by the Commission in compliance with the law, are calculated to provide documents that shed light on (1) whether the Applicants have been cooperative and forthcoming in connection with enforcement of Commission regulations and mandates including license conditions to which the Applicants agreed at the time their licenses were granted; (2) if not, why; (3) who was responsible for the non-compliance; and (4) whether different or better crafted conditions for approval of the merger are necessary or could be more effectively enforced.

30. Ascertaining whether conditions may be differently or better crafted and therefore might be better enforced is squarely in the Commission's decisional path on the merger, as in addition to USE, other parties of record have proposed conditions on the merger if approved.

31. The Commission cannot discharge its duty to ascertain whether the merger is in the public interest, even if conditioned, without public disclosure of documents that will illuminate how to craft meaningful and enforceable conditions.

FOIA Request

32. On January 25, 2008, USE filed an FOIA request with the Commission pursuant to 47 C.F.R. § 0.461, a copy of which is attached as **Exhibit A**.

33. USE also sought expedited action because "the documents and information are relevant to the record being made in MB Docket 07-57."

34. USE's FOIA Request sought the production of the following documents:

1. For the period January 1, 2005 to date, each non-privileged, non-exempt document relating to the "Petition for Declaratory Ruling to Clarify the Lack of Enforcement and Implementation of the Interoperable Mandate, FCC Rule 47 CFR sec. 25.144(a)(3)(ii)" filed July 5, 2007 in MB Docket No. 07-57 ("Petition").
2. For the period 2005 to date, each non-privileged, non-exempt document relating to each document relating to the certifications required of the Satellite Digital Audio Radio Service (SDARS) operators "that their systems include a receiver that will permit end users to access all licensed SDARS systems that are operational or under construction." (See, Letter of Thomas S. Tcyz, Chief, Satellite Division to Patrick Donnelly, Executive Vice President and General Counsel, Sirius Satellite Radio, January 28, 2005, a web posted copy of which is attached for reference.)
3. For the period January 1, 2003 to date, each non-privileged, non-exempt document relating to Interoperable Technologies, LLC.

5. For the period January 1, 2005 to date, each non-privileged, non-exempt document relating to Sirius' and XM's compliance with the equipment authorization rules governing emission limitations for satellite radio receivers, including without limitation, those matters raised and considered in connection with File No. EB-06-SE-250.
6. For the period January 1, 2005 to date, each non-privileged, non-exempt document relating to Sirius' and XM's compliance with the equipment authorization rules governing emission limitations for satellite radio receivers.
7. For the period January 1, 2006 to date, each non-privileged, non-exempt document relating to XM's and Sirius' compliance with their respective authorizations for terrestrial repeaters.

35. Upon receipt of USE's FOIA Request, the FCC assigned it FOIA Control Number 2008-190 (hereinafter referred to as "FOIA 2008-190").

36. On February 4, 2008, the Commission's Enforcement Bureau ("EB") denied USE's request for expedited treatment claiming that no compelling need for such action had been certified.

37. The EB's ruling, attached at **Exhibit B**, defined a "compelling need" in part as "when a requester is primarily engaged in disseminating information, there is an urgency to inform the public concerning actual or alleged Federal Government activity."

38. The EB denied the request for expedited action ruling "we have determined that you have not fulfilled either requirement for expedited processing of your FOIA request." *Id.*

39. The EB did not address or explain why the relevancy of the documents and information to the record in MB Docket 07-57 did not qualify as information that needed to be disseminated due to the urgency to inform the public about the actual or alleged Federal Government activity of approving a merger. *Id.*

40. The EB did not address why the Applicants' qualifications and their record for compliance with Commission rules and policies was not relevant to the Commission's determination whether to approve the Merger.

41. On February 25, 2007, the FCC sought a ten working day extension to respond to FOIA 2008-190 pursuant to 5 U.S.C. §552(a)(6)(B)(i).

42. On March 6, 2008, the FCC requested an additional 10 business days to respond to FOIA 2008-190.

43. USE did not consent to the March 6th request for another extension to respond to FOIA 2008-190.

44. On February 14, 2008, pursuant to 47 C.F.R. § 0.461(d)(3), the Commission asked XM and Sirius if they wished to supplement their previous requests for confidential treatment of submissions they had made pursuant to an FOIA request by the National Association of Broadcasters ("NAB") in 2007.

45. On February 29, 2008, XM and Sirius submitted supplemental confidentiality requests.

46. On March 5, 2008, USE responded to XM's and Sirius' supplemental confidentiality requests by Letter from Charles H. Helein, Esq. Helein and Marashlian, LLC, to Kathryn S. Berthot, Chief Spectrum Enforcement Division, Enforcement Bureau, attached as **Exhibit C**.

47. On March 21, 2008, the EB granted in part and denied in part USE's requests for the documents and information specified in FOIA 2008-190 by Letter from Kathryn S. Berthot, Chief Spectrum Enforcement Division, Enforcement Bureau to Charles H. Helein, Esq., Helein and Marashlian, LLC, attached as **Exhibit D**.

48. In partially denying USE's Request, the EB held that XM and Sirius demonstrated that substantial competitive harm was likely to result from the release of the requested information and therefore were exempt from disclosure pursuant to Exemptions 4 and 7 of the FOIA, 5 U.S.C. § 552(b)(4) and (7).

Application For Review

49. Pursuant to Section 0.461(i)(2) of the Commission's Rules, on March 31, 2008, USE filed an Application for Review of the EB's March 21, 2008 decision to the extent it denied USE's Request ("USE AFR ") attached as **Exhibit E**.

50. The EB's partial denial of USE's Request fails to articulate any basis for balancing the rights of the public and the need for the Commission to have the documents and information in the record in the Merger Docket against the merger Applicants' claims for confidentiality.

51. The EB's partial denial of USE's Request fails to articulate any basis to reject the fact that the relevancy of documents and information to the merits of the merger and the public interest issues raised defeats any interests XM and Sirius have in preventing disclosure.

52. The EB's partial denial fails to consider that public filings made with the SEC undercut claims by Sirius and XM that they will be competitively harmed by the disclosure of the requested documents and information to the extent such SEC filings contain information similar to the information sought by USE in its FOIA requests.

53. For example, in Sirius' SEC 10-K filing made by Sirius on March 28, 2003 at pp. 7-8, it identified its consumer electronics manufacturers, the receiving devices for automobiles available to its subscribers, the identity of its manufacturers and the retailers of the FM modulated radios, the three-band radios and its price and cost factors.

54. The EB's citation to SEC filings by the Applicants as grounds for partially granting USE's Request because the information has been publicly disclosed by such filings cannot be reconciled with its ignoring other SEC filings such as that cited in the preceding paragraph in partially denying USE's Request based on claims of competitive harm.

55. In partially denying USE's Request, the EB ignores the facts that since February 2000, when XM and Sirius in their SEC filings designated each other as sole competitors in the satellite radio market, nevertheless worked together to develop a unified standard for satellite radios to enable consumers to purchase one radio capable of receiving both Sirius and XM Radio's services, they cross-licensed their intellectual property to each other. *Id.* at p. 7.

56. In partially denying USE's Request, the EB ignores the fact that XM and Sirius have been engaged in merger discussions since early 2006 and exchanged each party's detailed information including trade secrets, and commercial and financial information to their direct

competitor, i.e., each other.

57. In partially denying USE's Request, the EB has not addressed why disclosure of documents and information on the Applicants' noncompliance with the interoperability mandate sought by USE's Category 2 request should be denied under Exemption 7 (the "law enforcement" exemption).

58. The EB assertion that no responsive documents were found on USE's Category 1 request about the Commission's refusal to deal with the issue of interoperability despite being specifically requested to do so begs the question of whether there are no "nonexempt or non-privileged" responsive documents or simply no documents.

59. USE's AFR also sought Commission review of the EB's conclusion that there "are no responsive documents" to Categories 1 through 4 of the FOIA Request.

60. The EB's conclusion that there are "no responsive documents" begs the question considering the following:

- Category 1 sought documents about the Petition for Declaratory Ruling on the meaning of the interoperable radio mandate that was ordered handled as a "complaint," an unprecedented or at least rare action that it would seem would require some documentation between Commission offices to execute.

- Category 2 that sought documents about XM/Sirius' certifications about the interoperable radio had attached a copy of an FCC letter dated January 28, 2005 raising an issue about the thoroughness of the search of Commission records on this matter.

- Categories 3 and 4 asked about a company, that on information and belief has something to do with the interoperability mandate, Interoperable Technologies LLC. The EB's response that there are no responsive documents in regard to this company is incomplete. It does

not inform USE that there are in fact no such documents in the FCC's records, versus there are such documents but they are all considered exempt or privileged.

61. On information and belief, Interoperable Technologies LLC is the company formed by XM and Sirius under their Joint Development Agreement they entered on February 16, 2000 to develop an interoperable radio as mandated by the Commission's condition imposed on the grants of the licenses to each company.

62. If this is the case, it is implausible that the Commission would have no documents, not even an email; regarding this aspect of the Applicants' supposed effort to address the interoperability mandate after the Commission itself had made inquiries of the Applicants about the status of those efforts. See ¶¶ 16-17, *Supra*.

63. Among others,¹ USE has urged the Commission to condition its approval on requiring open access to the satellite radio network, *i.e.*, to prevent the merged entity from extending its control of the network services to the devices that are required by the public to access those services.

64. The condition proposed would require the Applicants to make their proprietary chipsets available on reasonable and nondiscriminatory terms to consumer electronics manufacturers so that they could provide competitive choices in satellite radio receivers.

65. In order to craft meaningful, enforceable conditions that will ensure open access, it is essential that the documents USE has requested and been denied access to, as well as the

¹ Chairman John Dingell of the House Energy & Commerce Committee and Chairman Edward Markey of the Subcommittee on the Internet and Telecommunications of the House Energy & Commerce Committee wrote the Commission on May 1, 2008 urging adoption of such a condition. Public Knowledge, the National Association of Telecommunications Officers and Advisers, Media Access Project and New America Foundation, along with iBiquity and the HD Radio Alliance have also supported the condition in the record before the Commission.

documents USE has been granted access to but denied by the applications for review filed by XM, Sirius and others, as identified below, be made part of the record in the Merger Docket.

66. The facts are that the Applicants have not provided an interoperable satellite radio receiver despite this being a condition on the grants of their respective licenses since 1997.

67. Yet, the Applicants have never been questioned, much less held accountable for the lack of producing an interoperable satellite radio receiver.

68. Documents shedding light on how and why this condition has not been enforced or made effective are directly relevant to ensuring that any conditions attached to the consolidation of the two SDARS licenses are not similarly nullified by the Applicants and are successfully enforced by the Commission.

69. The Commission is obligated under Section 309 of the Communications Act to determine whether the public interest will be served or harmed by a grant of the applications in Merger Docket.

70. An applicant's compliance with Commission rules and law directly implicates the public interest insofar as it illuminates whether it will implement a Commission authorization in compliance with its terms.

71. For example, as disclosed in the SEC 10-Q filing made by Sirius on November 8, 2006, and the SEC 10-Q filing made by XM on November 9, 2006, in April 2006, Sirius and XM received inquiries from the Commission as to whether the FM transmitters in their products complied with the FCC's emissions and frequency rules.

72. Two years after the Commission's inquiries began, the companies continue to report their non-compliance in their SEC filings.

73. In Sirius' 10-Q filing on May 12, 2008, page 34, Sirius reports –

FCC Matters. In April 2006, we learned that XM Radio and two manufacturers of SIRIUS radios had received inquiries from the FCC as to whether the FM transmitters in their products complied with the FCC's emissions and frequency rules. We promptly began an internal review of the compliance of the FM transmitters in a number of our radios. In June 2006, we learned that a third manufacturer of SIRIUS radios had received an inquiry from the FCC as to whether the FM transmitters in its products complied with the FCC's emissions and frequency rules. In June 2006, we received a letter from the FCC making similar inquiries. In July 2006, we responded to the letter from the FCC in respect of the preliminary results of our review. In August 2006, we received a follow-up letter of inquiry from the FCC and responded to the FCC's further inquiry. We continue to cooperate with the FCC's inquiry.

During our internal review, we determined that certain of our radios with FM transmitters were not compliant with FCC rules.

In connection with our internal review, we discovered that certain SIRIUS personnel requested manufacturers to produce SIRIUS radios that were not consistent with the FCC's rules. As a result of this review, we are taking significant steps to ensure that this situation does not happen again, including the adoption of a compliance plan, approved by our board of directors, to ensure that in the future our products comply with all applicable FCC rules.

74. In its SEC 10Q filing, May 12, 2008, page 55, XM reports,

FCC Receiver Matter—As we have previously disclosed, we have received inquiries from, and responded to, the FCC regarding FM modulator wireless transmitters in various XM radios not in compliance with permissible emission limits...We have been submitting documents to the FCC and are in discussions with the FCC to resolve this matter. We cannot predict at this time the extent of any further actions that we will need to undertake or any financial obligations we may incur. There can be no assurance regarding the ultimate outcome of this matter, or its significance to our business, consolidated results of operations or financial position.

75. Sirius' violation of Commission rules regarding construction and operation of its terrestrial repeaters also continues to be reported.

76. In Sirius' same 10-Q filing of May 12, 2008, at page 34, Sirius reports –

In October 2006, we ceased operating 11 of our terrestrial repeaters which we discovered had been operating at variance to the specifications and applied to the FCC for new authority to resume operating these repeaters.

77. In XM's 10 Q for May 12, 2008 at page 55, it is reported –

FCC Repeater Network Matter—In October 2006, we filed for both a 30-day Special Temporary Authority (“STA”) and a 180-day STA with respect to our terrestrial repeater network, seeking authority to continue to operate our entire repeater network despite the fact that the technical characteristics of certain repeaters, as built, differ from the technical characteristics in the original STAs granted for our repeater network. These differences include some repeaters not being built in the exact locations, or with the same antenna heights, power levels, or antenna characteristics than set forth in the earlier STAs... We continue to communicate with the staff of the FCC regarding these matters. In February 2007, we received a letter of inquiry from the FCC relating to these matters, to which we have responded. This proceeding may result in the imposition of financial penalties against us or adverse changes to our repeater network resulting from having repeaters turned off or otherwise modified in a manner that would reduce service quality in the affected areas.

78. While XM and Sirius have acknowledged that the Commission’s inquiry may result in fines, additional license conditions or other FCC actions that could be detrimental to their business, the activities and the participation of the individual executives and senior-level employees involved in these violations have not been disclosed.

79. It is unquestionably relevant and important for the Commission, in its consideration of the Merger Docket, to determine the roles played by the individual executives and senior-level employees in these violations and, depending on the nature and extent of their involvement, whether they may appropriately continue in their positions with these licensees.

80. Disclosure of the documents and information sought by USE is therefore required so that they may be made part of the record in the Merger Docket and cast additional light on how to craft meaningful and enforceable conditions to protect the public interest as the Commission is required by statute to do.

81. USE has argued consistently in its filings with the Commission that a merger without conditions will result in XM and Sirius controlling not only the network, but also the manufacturing and distribution of hardware which would in turn result in an increase in price, decrease in service, decrease in choice, lack of innovation and poor quality of service.

82. While Sirius has claimed that it does not physically manufacture, import, or distribute radios themselves, it has been disclosed elsewhere that it has extensive control over these processes

83. In its SEC 8K filing on April 29, 2008, p 2, Exhibit 10.33, Directed Electronics, Inc. (DEI), Sirius' exclusive retail distributor, reported it had received from Sirius amendments made by Sirius to the contract between DEI and Sirius to which DEI agreed to accept.

84. The terms of these contract amendments show that Sirius intends to and will control who the manufacturer is, what is to be produced, decide at what price the product will be sold, decide what warranty policy the distributor will adhere to, what inventory levels will be kept and what the price of the product will be.

85. These terms demonstrate that post-merger, Sirius, as the surviving entity, intends to control completely the public's access to the radio receivers needed to access the merged entity's network services extending its exclusive control over the satellite radio spectrum and the content of the services provided thereon to the vertical market, the satellite radio receivers.

Other Applications For Review

86. On April 4, 2008, Sirius filed an Application for Review of the EB's March 21, 2008 decision to the extent it granted USE's FOIA Request.

87. On April 15, 2008, USE filed an Opposition to Sirius' AFR.

88. On April 4, 2008, executive and senior-level employees of Sirius, named as John Does 1 and 2 filed their Application for Review to the EB's March 21, 2008 decision to the extent it granted USE's FOIA Request.

89. On April 15, 2008, USE filed an Opposition to Sirius' John Does' AFR.

90. On April 4, 2008, XM and Four XM employees filed an Application for Review

of the EB's March 21, 2008 decision to the extent it granted USE's FOIA Request.

91. On April 8, 2008, USE filed its Opposition to XM's AFR.

92. The time limits under 5 U.S.C. §552(a)(6)(A)(ii) for Commission action on each party's filing of an AFR has expired.

93. The time limit on USE's AFR expired April 28, 2008.

94. The time limit on KRI's AFR expired May 1, 2008.

95. The time limit on Sirius', XM's, Sirius John Does, and Four XM Employees AFRs expired May 2, 2008.

NAB's FOIA Request

96. The National Association of Broadcasters ("NAB") in 2007 filed an FOIA request (FOIA Control No. 2007-235) that sought many of the same documents and information USE's FOIA Request seeks.

97. On June 18, 2007, in a Letter Ruling, the Enforcement Bureau granted in part and denied in part the NAB FOIA Request.

98. On June 29, 2007, Sirius filed an Application for Review of the EB's June 18, 2007 Letter Ruling which remains pending before the Commission without action.

99. On July 2, 2007, XM filed an Application for Review of the EB's June 18, 2007 Letter Ruling which remains pending before the Commission without action.

100. On July 2, 2007, Four XM Employees filed an Application for Review of the EB's June 18, 2007 Letter Ruling which remains pending before the Commission without action.

101. On or about July 2, 2007, Three Unnamed Employees of XM filed an Application for Review of the EB's June 18, 2007 Letter Ruling which remains pending before the Commission without action.

102. As of the filing of this Complaint, the Applications for Review of the EB's June 18, 2007 Letter Ruling have been pending before the Commission for over 10 months without action.

103. The documents and information that was sought a year ago by NAB and the documents and information sought by USE a little over three months ago concern Sirius' and XM's compliance with the explicit condition imposed on the satellite radio licenses awarded to them in 1997, viz., the requirement that their satellite radio "systems include a receiver that will permit end users to access all licensed SDARS systems that are operational or under construction."

104. The documents and information that was sought a year ago by NAB and the documents and information sought by USE a little over three months ago concern Sirius' and XM's compliance with the technical requirements governing emission limitations explicitly set forth in the Commission's equipment authorizations issued for XM's and Sirius' satellite radio receivers.

105. The documents and information that was sought a year ago by NAB and the documents and information sought by USE a little over three months ago concern Sirius' and XM's compliance with the geographical parameters explicitly set forth in their licenses granted for the placement of terrestrial repeater stations.

106. The documents and information sought by USE over three months ago seek the identity of the individual executive and senior-level employees involved in the activities described above.

107. The activities and the participation of the individual executive and senior-level employees relate directly to XM's and Sirius' whether the operation of their respective satellite

radio services can be conducted in accordance with the terms and conditions of those licenses.

108. An applicant's compliance with Commission rules and law directly implicates the public interest in whether it will implement a Commission authorization in compliance with its terms.

109. Disclosure of the documents and information sought by USE is therefore required so that they may be made part of the record in the Merger Docket.

110. Disclosure of the requested documents and information is extremely time sensitive because action in the Merger Docket is reported to be imminent.

111. Because of its concerns over the tensions between the timing of disclosure of the documents and information and the timing of action in the Merger Docket, in a Letter from Charles H. Helein, Counsel for USE to Laurence Schecker, Office of General Counsel, FCC, May 5, 2008, attached as **Exhibit F**, it was pointed out that time for action on the Applications for Review had expired and asked whether and when action might be taken by the Commission.

112. In an E-mail of May 9, 2008 Charles H. Helein Counsel for USE to Laurence Schecker, Office of General Counsel, attached as **Exhibit G**, a second inquiry was made about possible action on the Applications For Review.

113. These inquiries have not been responded to at this time.

114. The Commission, interested parties and the public in general need disclosure of the information requested in USE's FOIA Requests so it may be filed in the Merger Docket and considered in regard to the Merger Applicants' qualifications as Commission licensees and their willingness and ability to comply with Commission rules and policies.

115. The FOIA mandate that the Commission resolve appeals of its decisions within 20 working days, 5 U.S.C. § 552(a)(6)(A)(ii), has not been met.

116. The Commission has not notified USE that it would need more than 20 working days to resolve its Application for Review.

117. USE's Application for Review was constructively denied on April 28, 2008.

118. Sirius' Application For Review was constructively denied on May 2, 2008.

119. XM's and the 4 XM Employees' Application For Review was constructively denied on May 2, 2008.

120. Sirius John Does' Application For Review was constructively denied on May 2, 2008.

121. The statutory 20 working day time frame for the Commission to resolve the Applications for Review has expired.

122. Pursuant to 5 U.S.C. § 552 (a)(6)(C)(i), any person requesting records from any agency shall be deemed to have exhausted his administrative remedies if the agency fails to comply with the 20-day time limit for resolving appeals.

123. The Commission failed to comply with the 20 working day deadline and USE is deemed to have exhausted its administrative remedies.

124. Having exhausted all administrative remedies, USE is entitled to obtain judicial action on its FOIA Requests.

125. No further avenues of appeal are available within the Commission.

126. USE states that foregoing facts are true and correct to the best of its knowledge, information and belief.

CAUSE OF ACTION
Violation of the Freedom of Information Act for
Wrongful Withholding of Agency Records

127. USE repeats and re-alleges paragraphs 1-122.

128. The Commission has wrongfully withheld agency records requested by USE by failing to comply with the statutory time limit for the processing of FOIA Requests and the Application for Review.

129. USE has exhausted the applicable administrative remedies with respect to the Commission's wrongful withholding of the requested records.

130. USE is entitled to injunctive relief with respect to the release and disclosure of the requested records.

Demand for Relief

Wherefore, Plaintiff USE respectfully requests that this Court take expedited action and:

(1) order the immediate disclosure of the following documents:

Category 1, Subject to (2) and (3) following, the Petition for Declaratory Ruling and each internal document by which this Petition was referred to the EB to be processed as a formal complaint instead of a Petition for Declaratory Ruling, each document created to process this Petition as a formal complaint, and each document or citation to Commission rule, order or policy by which a Petition for Declaratory Ruling that authorizes such conversion and the identity of the office and officer(s) within the Commission that authorized the conversion;

Category 2, the Commission's copy of the January 28, 2005 letter from Mr. Teyz to Sirius and XM, Sirius and XM's responses of March 14, 2005 and all other related documents;

Categories 5-8, all documents the EB has cleared for disclosure and all documents the EB has withheld from disclosure.

(2) order the Commission to disclose whether the determination that there are no responsive documents is based on a determination that such documents as do exist in these categories are either exempt or privileged;

(3) order the Commission to list the documents in Categories 1-4 that the Commission has labeled exempt and/or privileged in reaching its determination that there are "no responsive documents."

(4) declare that the Commission's refusal to disclose the documents requested by USE is unlawful;

(5) declare that the Commission's conduct in failing to comply with the statutory time frames for resolving appeals of FOIA requests is unlawful;

(6) award USE its costs and reasonable attorney's fees in this action as provided by 5 U.S.C. § 552(a)(4)(E);

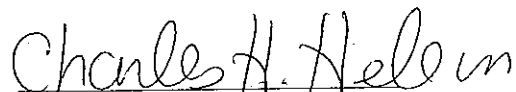
(7) order the Commission to take such actions as are ordered herein on an expedited basis;

(8) order the Commission not to act on the Merger until the documents and information are disclosed and placed in the record of the Merger Docket and a reasonable time provided for public comment after the documents and information have been made part of the record; and

(9) grant such other relief as this Court may deem just and proper.

Respectfully submitted,

Dated: May 14, 2008


Charles H. Helein
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